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No. 07-1386

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IN THE

Supreme Court of the United States

GERI KANNAPIEN, *et al.*,

Petitioners,

v.

QUAKER OATS COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED

Respondents' recreation of the question misstates the nature of the case.

Petitioners do not seek to establish an estoppel claim against an existing unambiguous ERISA pension plan. Rather, petitioners assert an estoppel claim against the employer to enforce the terms of a "special" "one-time only" early retirement package, only part of which included pension plan benefits, in the employer-initiated solicitation of voluntary terminations, misdescribed by the employer's designated spokesman, who admitted describing the package's benefits as all dating from the employees' original hire date.

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Petitioners Geri Kannapien and Janice Rozhon ("Petitioners or Plaintiffs") respectfully submit this reply to Quaker Oats Co. and PepsiCo's ("Respondents" or "Defendants") brief in opposition (Opp. at __) to the petition for a writ of certiorari.

Respondents' misstatement of the question and the case is shocking, no more honest with this Court than was their treatment of employees.

Petitioners do not "seek . . . additional benefits under the Quaker Retirement Plan." Opp. at 1. They seek what their employer, speaking through its designated H.R. spokesperson Jeff Satterlee, admittedly promised them in soliciting employees to voluntarily retire early—a three-part "one-time-only" "special" package, all parts dating from the person's original hire date. Petitioners sought this against the soliciting employer, not against the Plan.

Indeed, as presented below, the employer's resort to the "strict terms of the plan" defense is ironic and disingenuous since it was only discovered in the litigation that part of the benefits, the Change in Control portion (by their terms available only to employees who were involuntarily terminated after Pepsico's acquisition of Quaker, Opp. at 2-3) were part of the package only by the employer's falsely recharacterizing the voluntary terminations as involuntary.

Respondents' portrayal of Mr. Satterlee as merely "a manager" and "neither a plan fiduciary nor administrator," Opp. at 3, itself reinvents the record and ignores that he was the employer's designated spokesperson to answer questions about the package.

Indeed, he unequivocally admitted that he had explicitly presented the package as dating in all respects from the employees' original Bridgeview plant hire date.

No more honest is Respondents' minimizing their written explanation documents that also stated each Petitioners' "credited service date" as Petitioners' original hire dates as "inadvertent clerical error." Opp. at 4.

Respondents' arguments for denying the petition, Opp. at 6, are similarly misstated, asserting that Petitioners could not support any other elements of estoppel, based on: (1) asserting lack of reasonable reliance by mischaracterizing Petitioners as asserting claims with respect to the "unambiguous Quaker Severance Plan", rather than the "special" "one-time only" early retirement package, whose terms were explained by H.R. Manager Satterlee and the supporting documentation as dating from petitioners' original hire date; and (2) arguing lack of their detriment from taking the early retirement plan, by comparing the benefits from being fired, rather than from continuing their employment. Opp. at 8-9.

I. Petitioners *Can* Establish A Promise

Defendants' first argument, that Plaintiffs cannot establish a promise, ignores the record's clear showing that Plaintiffs' early retirement decisions were solely the desired product of the explicit employer-initiated solicitation to retire early for a promised three- part package, with *all* parts credited from the original hire date. While Satterlee *was* unable to determine the exact *amount* of Ms. Kannapien's pension at that time, he readily acknowledged having explicitly assured her that it would be based on her actual salary and her total years

of service *dating from her original hire date with Golden Grain*, (R. #108 p. 6-7, Ex. 2; R. #115: Attch. 6 p. 79, 82) and everyone acknowledges that it was based on this representation made by Quaker's dedicated H.R. "explainer", Satterlee that Plaintiff Kannapien retired.

Identically, in Rozhon's informational conferences with designated HR manager Satterlee, Quaker represented to Plaintiff Rozhon that her benefits would date from her original hire date, adding that Ms. Rozhon should accept the package because it was probably the last package that would be offered by Quaker, that PepsiCo would not be offering anything, (R. #115: Attch. 7 p. 92-93, 120) and based on the original hire date assurance at this meeting, Plaintiff Rozhon also retired early.

II. Plaintiffs Did Reasonably and Detrimentally Rely on Quaker's Offer

Second, Defendants' assertions that Petitioners' reliance on Quaker's acknowledged misrepresentation, not contained in the strict plan terms is unavailing for three reasons. First, the special package was not presented as "an" or "the" existing plan. Second, the documents Quaker provided Petitioners also showed their original hire date as the credited service date. Third, the Change In Control portion of the package was based, unbeknownst to the solicited employees, on repapering their voluntary terminations as involuntary.

Thus, the employees' reliance was eminently reasonable because they were relying on the *package* presented, supported by written material with their original hire date, and the Company was ignoring the strict plan terms for the package being offered. Whether on clean hands or mere equitable considerations, the Company's resort to the strict plan terms ought to be unavailing in such a case.

The relevance, that both loved their jobs and would otherwise have continued their employment at Quaker, is that the detriment of taking the package should have been compared with their continuing to work and accrue benefits, not, as the court below reviewed it, with their being involuntarily terminated.

The assertion that petitioners could not show reasonable and detrimental reliance, under the other circuits' standards, Opp. at 10-11, rests only on Quaker's standard plan as unambiguous and Sattlerlee's inability to calculate the amount of the benefits; ignoring that petitioners' claim differently arises from the "special", "one-time only" package employer-solicitation, explicitly misrepresented as dating from petitioners' original hire date.

Plainly, the Petitioners relied on Quaker's misrepresentations and retired early. Ultimately, that reliance would cost the now-retired Plaintiffs over $100,000 each.

III. Defendants' Denial of The Clear Circuit Split is Tautological and Wrong

A. Defendants Concede that the Second Circuit Standard Conflicts with the Seventh Circuit Standard and Ignore that the Employer-Initiated Solicitation Satisfies Any "Extraordinary Circumstances" Standard[1]

Defendants simply cannot sidestep the circuit split and Petitioners satisfaction of every "extraordinary circumstances" test. The Second Circuit has found extraordinary circumstances in cases where an employer reneged on a promise made with the intention of inducing employees to take actions benefiting the employer, such as joining the company or accepting early retirement. *See Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 101 (2d Cir. 2001); *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 86-87 (2d Cir. 2001); *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 80 (2d Cir. 1996).

Quaker's misrepresentations to Petitioners were employer-initiated for the sole purpose of inducing Petitioners to voluntarily retire early, for Quaker to obtain cost reductions by "downsizing." In this context, the burden of showing "intent to deceive" should not be placed on employees. The information that Petitioners needed to make a fully informed decision was in the sole hands of Quaker. Indeed, Quaker forfeited any

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1. Importantly, Respondents argue that there is no circuit split, yet concede that the Ninth and Eleventh Circuits have a different standard than the Fourth Circuit, which in turn has a different standard than the Seventh Circuit. Opp. at 11-12. And, they tacitly admit that there is a conflict between circuits that have decided estoppel claims, but "only the Second Circuit has considered ERISA estoppel in any depth." Opp. at 15.

right to presumption since the record shows the misrepresentations made to Petitioners were done without any effort to either determine or verify the terms being offered.

Further, while Defendants, Opp. at 13-14, agree that "extraordinary circumstances" are needed to satisfy the Third, Eleventh and Sixth Circuit standards and cite to *Kurz v. Phila. Elec. Co.*, 96 F.3d 1544, 1553 (3d Cir. 1996); *Cotton v. Massachusetts Mutual Life Insurance Co.*, 402 F.3d 1267 (11th Cir. 1990); and *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1326 (11th Cir. 2008) *Crosby v. Rohm*, 408 F.3d 423, 431 (6th Cir. 2007), Defendants ignore that Petitioners amply meet the requirement of "similarly inequitable conduct" that is imputed in the "extraordinary circumstances" inquiry, and the misstatements to Petitioners were not "simple ERISA reporting errors." Rather, they were misrepresentations that induced Petitioners into early retirement.

IV. This Case Does Present an Excellent Vehicle for This Court's Review

Indeed, what sets this case apart from most, and makes this an ideal vehicle for addressing this issue is the designated spokesperson's rare and honest admission that he had explicitly represented the package as dating in all respects from Mmes. Kannapien's and Rozhon's original hire dates.

Additionally, Respondents' argument ignores that the terms of the employer-initiated solicitation package were at least as "ambiguous" as the 9th and 11th Circuits' requirements, because the employer initiated

solicitation package was not a finite unambiguous plan. Rather it was a cobbled-together pastiche of part plan, part papered-over unavailable Change in Control payments, plus an additional non-plan offering, all of whose terms were not even known to the managers/officers presenting or explaining them. In this context, the misstatements were hardly "innocent." Opp. at (i), 8, 9, 12, and 17 . Rather, they were at least negligent, more appropriately labeled *reckless* and with complete disregard as to what the terms of the employer solicitation actually were.[2]

V. Defendants Ignore the Impact of This Court's Recent Ruling in *Metropolitan Life v. Glenn*.

The other point not addressed by Respondents' July 7, 2008 opposition, is the issue raised by this court's June 19, 2008 decision in *Metropolitan Life v. Glenn*, 128 S. Ct. 2343 (2008), in which the adverse decision by a plan administrator who is both evaluator and payor is a factor to be used in evaluating the administrator's decision.

In context here, it would be a basis for summary remand for reconsideration by the courts below, of PepsiCo's Administration Committee's rejection of Petitioners' claim, since the composition of the Committee was exclusively PepsiCo employees who were charged with determining whether to approve a claim

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2. Defendants' reliance on *Greany v. Western Farm Bureau Life Insurance Co.*, 973 F.2d 812, 821 (9th Cir. 1992); *Kane v. Aetna Life Insurance*, 893 F.2d 1283 (11th Cir. 1990); and *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1326 (11th Cir. 2008) is puzzling. Neither *Greany* nor *Kane* discussed Defendants' supposed "knowledge" requirement, and *Busby* is a case that does not even involve ERISA.

adverse to their employer. The pressure that these persons were under was itself demonstrated by the tearful admission by PepsiCo's liaison to the plan administrator, Kiren Kabat that she thought something should be done for Plaintiffs-Petitioners here if the company legally could.

This is precisely the situation — where the administrative committee "decider" is composed solely of the payor's mid-level employees in which the administrator's conflict is squarely presented. *See Metropolitan Life v. Glenn*, 128 S. Ct. 2343 (2008).

Finally, Respondents do not dispute the dearth of decisions on what meritorious common law claims may still exist in connection with early retirement severance "packages" that are distinct from existing plan benefits.

In this context, there simply must be a point short of intentional deception that an employer soliciting early retirements with a "special" outside-the-regular-plan package will be held to admitted promises made by its dedicated spokesman. This Court should grant the petition, resolve the conflicting standards among the circuits, and declare where that line is drawn.

Respectfully submitted,

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